Editor's note: Reconsideration granted; decision vacated -- See William Carlo, Sr. (On Reconsideration), 53 IBLA 168 (March 12, 1981)

WILLIAM CARLO, SR.

IBLA 75-318 Decided July 25, 1975

Appeal from decision of Fairbanks District Office, Bureau of Land Management, rejecting Native allotment application F-13523.

Affirmed as modified.

1. Alaska: Native Allotments

   More than a quarter of a century of nonuse of land by an applicant for a Native allotment negates any assertion of substantially continuous use and occupancy and militates against a finding of substantial actual possession potentially exclusive of others, as required by law and regulation. Such a long period of nonuse by applicant vitiates any effective qualifying use and occupancy which may have preceded the long period of lack of use.

2. Alaska: Native Allotments

   Lands in a powersite withdrawal are not available for Native allotment unless the applicant has completed five years of qualifying use and occupancy prior to the filing of the application for withdrawal for powersite purposes.

APPEARANCES: E. John Athens, Jr., Esq., Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

William Carlo, Sr., has appealed from a December 20, 1974, decision of the Fairbanks District Office, Bureau of Land Management (BLM), rejecting his Alaska Native allotment application filed pursuant to 43 U.S.C. §§ 270-1 through 270-3 (1970) and 43 CFR subpart 2561. The

decision states that because the applicant "has not submitted substantial evidence to show that he has, in fact, used and occupied the land involved as required by the Native Allotment Act, this application and evidence of occupancy is hereby rejected and the claim is canceled."

On March 3, 1971, appellant filed his Native allotment application. He stated therein he used the land applied for continuously from 1930 to the present for fishing, hunting, trapping and ratting.

A field examination was conducted by the Bureau of Land Management. The report of the field examination points out that Carlo stated he was born in 1915. He first used the land involved from 1927 to 1931 at which time he moved to Ruby, Alaska. From 1931 to 1957 he did not use the land as he was not living near enough to the land involved to utilize it. In 1957, Carlo moved to Fairbanks, Alaska. He began using the land on an infrequent basis, about a week at various times in the winters of 1957, 1969, and 1972. According to the field report, none of the witnesses in the area could verify such alleged use.

The Bureau records show the subject land was included, among other lands, in an application filed on January 9, 1963, by the Director, Geological Survey, to withdraw them from all forms of appropriation under the public land laws and for classification for powersite purposes for the Rampart Canyon Power Project. The area was designated and classified as "Powersite Classification No. 445" on January 5, 1965, the subject of Public Land Order (PLO) 3520, published in 30 F.R. 271, January 9, 1965. The lands involved are subject to Section 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1970). Consequently, the lands within the Rampart Canyon Power Project have been segregated and withdrawn from appropriation under the Native Allotment Act, as amended, supra, since January 9, 1963, the date of filing the withdrawal application. 43 CFR 2091.2-5, 2351.3.

The decision appealed from, after referring to Carlo's alleged use of the land from 1927 to 1931, found that his nonuse for 26 years from 1931 to 1957 constitutes abandonment of the land. For the reasons stated below, we also reach the conclusion that the alleged use and occupancy from 1927 to 1931 followed by 26 years of nonuse does not qualify appellant for an allotment.

Section 3 of the Act of August 2, 1956, which amends the Native Allotment Act of May 17, 1906, supra, provides:

> No allotment shall be made to any person under this Act until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years.

The Department's Native Allotment regulations, in effect when appellant filed his Native allotment application, read in part:

> As used in the regulations in this section, (a) The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.
>
> (b) "Allotment" is an allocation to a Native of land of which he has made substantially continuous use and occupancy for a period of five years * * *.

43 CFR 2561.0-5 (1973).

[1] Appellant's long lack of use and occupancy covering a period of 26 years negates any assertion of substantially continuous use and occupancy and militates against a finding of substantial actual possession potentially exclusive of others, and not intermittent, as required by law and regulation. Moreover, more than a quarter of a century of nonuse vitiates the effectiveness of any use and occupancy which may have preceded such a long period of lack of use.

[2] The Bureau decision properly found that appellant's entry on the land for a few weeks during the winter of 1957 was not followed by at least five years of substantially continuous use and occupancy between 1957 and January 9, 1963, when the application was filed for the withdrawal of the land for powersite purposes. Accordingly, appellant's Native allotment application was properly rejected in compliance with the Secretarial instruction of October 18, 1973, which directs the rejection of allotment applications where the Native has not complied with the five year period of use and occupancy prior to the effective date of a withdrawal or reservation of the lands involved. 1/

Appellant argues that the Secretarial guidelines of October 18, 1973, requiring the five years of qualifying use and occupancy to have been completed prior to the effective date of a withdrawal or reservation of the land constitutes rule making and as such notice by publication in the Federal Register is required. We do not agree that the guideline is rule making. It is an application of existing law and regulation. The allowance of a Native allotment is discretionary with the Secretary. 43 U.S.C. § 270-1 (1970). It has consistently

1/ See 43 CFR 2561.1f and 2561.2(a).

been held that where a Native cannot demonstrate he has completed the five-year period of statutory use and occupancy prior to the effective date of withdrawal or segregation, the allotment application must be rejected. Mary T. Akootchook, 17 IBLA 189 (1974); Susie Ondola, 17 IBLA 359 (1974), and cases cited therein.

We turn to appellant's request for a hearing. By the filing of an application for a Native allotment, the applicant "acquires no rights." 43 CFR 2561.1 (1974). Accordingly, a Native allotment applicant is not entitled to a hearing as a matter of right. Appellant has made no offer of proof of facts not in the record which would likely result in a different conclusion from that established by the existing record. Consequently, his request for a hearing is denied.

Therefore, pursuant to the authority delegated by the Secretary of the Interior to the Board of Land Appeals, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Anne Poindexter Lewis
Administrative Judge

We concur:

Joan B. Thompson
Administrative Judge

Douglas E. Henriques
Administrative Judge